STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Michigan Court of Appeals
[Jansen, P.J. and Cavanagh and Gleicher, J.J.]

In re Estate of OLIVE RASMER.

DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Plaintiff-Appellee,

vs

RICHARD RASMER, Personal Representative of the Estate of OLIVE RASMER,

Defendant-Appellant.

Supreme Court No. 153356
Court of Appeals No. 326642
Bay Probate Court
LC No. 14-049740-CZ

In re Estate of IRENE GORNEY.

The appeal involves a ruling that a provision of the Constitution, a statute, rule or regulation, or other State governmental action is invalid.

DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Plaintiff-Appellant,

v

ESTATE OF IRENE GORNEY,

Defendant-Appellee.

Supreme Court No. 153370
Court of Appeals No. 323090
Huron Probate Court
LC No. 13-039597-CZ

In re Estate of WILLIAM B. FRENCH.

DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Plaintiff-Appellant,

v

DANIEL GENE FRENCH, Personal Representative for the Estate of WILLIAM B. FRENCH,

Defendant-Appellee.

Supreme Court No. 153371
Court of Appeals No. 323185
Calhoun Probate Court
LC No. 2013-000992-CZ

In re Estate of WILMA KETCHUM.

DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Plaintiff-Appellant,

v

ESTATE OF WILMA KETCHUM,

Defendant-Appellee.

Supreme Court No. 153372
Court of Appeals No. 323304
Clinton Probate Court
LC No. 14-28416-CZ

In re Estate of OLIVE RASMER.

DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Plaintiff-Appellant,

v

RICHARD RASMER, Personal Representative of the Estate of OLIVE RASMER,

Defendant-Appellee.

Supreme Court No. 153373
Court of Appeals No. 326642
Bay Probate Court
LC No. 14-049740-CZ

REPLY BRIEF OF APPELLANTS MICHIGAN DEPARTMENT OF HEALTH AND HUMAN SERVICES IN DOCKET NOS. 153370-3

Bill Schuette
Attorney General

Aaron D. Lindstrom (P72916)
Solicitor General
Counsel of Record

Matthew Schneider (P62190)
Chief Legal Counsel

Brian K. McLaughlin (P74958)
Geraldine A. Brown (P67601)
Assistant Attorneys General
Attorneys for Michigan Department of Health and Human Services
Plaintiff/Appellant
Health, Education & Family Services Division
P.O. Box 30758
Lansing, MI 48909
(517) 373-7700

Dated: November 28, 2016

TABLE OF CONTENTS

Page

Index of Authorities ii

Introduction 1

Argument 3

I. Implementing estate recovery for pre-acknowledgment benefits does not violate procedural or substantive due process. 3

A. Statutory enactment of estate recovery satisfied procedural due process 3

B. Estate recovery does not violate substantive due process, and it is not applied retroactively. 7

II. Whether the cost of recovery is in the best interest of the State is a determination made by the Department, not the courts. 9

Conclusion and Relief Requested 10

INDEX OF AUTHORITIES

Page

Cases

Atkins v Parker,
472 US 115 (1985) 7

Bd of Regents of State Colleges v Roth,
408 US 564 (1972) 8

Bonner v City of Brighton,
495 Mich 209 (2014) 3, 5

City of Kentwood v Estate of Sommerdyke,
458 Mich 642 (1998) 6

In re Gorney,
_ Mich App _ (2016) 2

Jones v Flowers,
547 US 220 (2006) 4

Landgraf v USI Film Products,
511 US 244 (1994) 8

Mennonite Bd of Missions v Adams,
462 US 791 (1983) 4

Mullane v Cent Hanover Bank & Trust Co,
339 US 306 (1950) 1, 4, 6

Richardson v Belcher,
404 US 78 (1971) 2, 4

Texaco, Inc v Short,
454 US 1982 (1982) 1, 6, 7

Tulsa Prof'l Collection Servs, Inc v Pope,
485 US 478 (1988) 4

United States v Carlton,
512 US 26 (1994) 9

Statutes

42 USC 1396c 8

42 USC 1396p 3

42 USC 1396p(b)(3) 9

MCL 400.112g 2, 3, 4

MCL 400.112g(3)(e) 5

MCL 400.112g(3)(g) 9

MCL 400.112g(4) 9, 10

MCL 400.112g(7) 5, 6

MCL 400.112g-112k 8, 9, 10

MCL 400.112h(a) 5, 7

MCL 400.112k 2, 5, 7

MCL 700.3101 8

MCL 700.3805(1)(f) 3, 8

INTRODUCTION

The Due Process Clause does not require individualized notice explaining the legal effect of a statute (here, a statute enacting estate recovery). The estates miss this basic point by conflating two things. First, they attempt to turn the constitutional requirement of sufficient notice *before an adjudicatory proceeding* into a constitutional requirement of notice *of what the law is*—even though enacting and publishing a statute *is* constitutionally sufficient notice of what the law is. *Texaco, Inc v Short*, 454 US 1982 (1982). Second, they conflate the *statutory* requirements in MCL 400.112g regarding written information with the *constitutional* requirements of notice prior to an adjudication.

The Department agrees with the estates that *Mullane v Cent Hanover Bank & Trust Co*, 339 US 306 (1950) requires notice of the adjudication. That notice was provided: these decedents' estates received notice of the Department's intended recovery and had the opportunity for a hearing to object to repaying the taxpayers for the benefits the decedents received.

But the estates are not contesting notice *of the adjudication*. Instead, they are contesting notice of the substantive content of Medicaid benefits. But the concept of due process does not support creating a new constitutional right to an enrollment notice that goes beyond the plain statutory text. Quite the opposite, "it has never been suggested that each citizen must in some way be given specific notice of the impact of a new statute on his property before that law may affect his property rights." *Texaco*, 454 US at 536.

Procedural due process does not provide a constitutional right to evade legislative changes to the Medicaid program that mandated estate recovery before these decedents ever applied for benefits. See *Richardson v Belcher,* 404 US 78, 81 (1971) (procedural due process does not "impose a constitutional limitation on the power of Congress to make substantive changes in the law of entitlement to public benefits."). And the estates' reliance on the Due Process Clause ignores that MCL 400.112g and MCL 400.112k provided notice of the content of the Medicaid benefits: they warned all individuals receiving benefits after September 30, 2007, that the benefits were subject to estate recovery. That means the decedents in fact had the very opportunity that the Court of Appeals asserts they were deprived of: the chance "to elect whether to accept benefits and encumber their estates, or . . . to make alternative healthcare arrangements." *In re Gorney*, slip op, p 10.

Even though the decedents had actual notice of this opportunity (in addition to the notice provided by the statutes themselves), the decedents chose not to make alternative arrangements. After the decedents received the acknowledgments explaining how estate recovery applied to them, they did not take any available actions to dispose of their property "according to that individual's desires" to avoid probate and estate recovery. (Ests' Br, 11/4/16, at 27.) A failure to avail oneself of an opportunity does not constitute a due-process violation by the state.

Nor does the enactment of estate recovery *before* the decedents ever applied for benefits involve retroactivity or violate substantive due process. There is nothing unreasonable in pursuing estate recovery to reimburse the state for the

direct costs of these decedents' care, as is mandated by federal law. In sum, the Department respectfully requests that this Court reverse the Court of Appeals.

ARGUMENT

I. Implementing estate recovery for pre-acknowledgment benefits does not violate procedural or substantive due process.

Estate recovery of pre-acknowledgment services does not violate procedural- or substantive-due-process rights because the Legislature established that these benefits would be subject to estate recovery before these four decedents ever applied for benefits. Both state law (MCL 400.112g, 400.112h(a), 400.112k, and 700.3805(1)(f)) and federal law (42 USC 1396p) put the decedents on notice in 2007 that estate recovery would apply to them and that the estate recovery program reaches all probate assets if they began receiving benefits after September 30, 2007. And any delay in implementing estate recovery or in providing individualized information regarding estate recovery does not violate procedural or substantive due process either, because after receiving the acknowledgments the decedents had the opportunity to choose how to manage their property but declined to do so.

A. Statutory enactment of estate recovery satisfied procedural due process.

This dispute involves two distinct components of procedural-due-process. Due process requires that deprivation of "property *by adjudication* must be preceded by notice and an opportunity to be heard." *Bonner v City of Brighton*, 495 Mich 209, 235 (2014) (emphasis added). But procedural due process does not "impose a constitutional limitation on the power of Congress to make substantive

changes in the law of entitlement to public benefits." *Richardson*, 404 US at 81. There were no violations under either aspect of due process.

These estates do not argue that they were deprived of notice prior to an adjudication so they can choose "whether to appear or default, acquiesce or contest." *Mullane*, 339 US at 314. Instead, the estates conflate constitutional requirements for notice prior to an adjudication with statutory requirements about written information under MCL 400.112g. (E.g., Ests' Br, 11/4/16, at 26 ("[M]ere statutory notice about the existence of the Medicaid estate recovery clearly fails to satisfy the Due Process Clause since DHHS was required to provide . . . written notice of the actual written provisions of the estate recovery program . . . .").)

The Department agrees that *Mullane* and its progeny require constitutionally sufficient notice prior to an adjudication involving a deprivation of property. 339 US at 314. In *Mullane*, the U.S. Supreme Court held that constructive notice of a *judicial hearing* to approve a trust accounting was deficient because the name and address for the present beneficiaries were known. *Id* at 318-319. Likewise, in another case that the estates cite, *Mennonite Bd of Missions v Adams*, 462 US 791, 799-800 (1983), the U.S. Supreme Court rejected constructive notice by posting or publication to a mortgagee of a pending tax sale proceeding. See also *Jones v Flowers*, 547 US 220, 231 (2006) (due process requires additional reasonable steps for notice of proceedings when mailing is returned undeliverable); *Tulsa Prof'l Collection Servs, Inc v Pope*, 485 US 478, 490 (1988) (constructive notice of probate proceedings to known creditors of estate insufficient for due process).

But all of the above cases involved whether the notice of the adjudication was sufficient, not whether there was notice of legislative changes affecting property rights. Here, each estate had sufficient notice of the adjudication: each estate disallowed the Department's claim as a creditor against the probate estate, and they fully litigated that issue before the probate courts. They received all the process they were due. *Bonner*, 495 Mich at 238 ("[D]ue process was satisfied by giving plaintiffs . . . the opportunity to appeal that decision to the circuit court.").

As to notice of legislation affecting Medicaid rights, before any of these decedents applied for benefits, both state and federal law in 2007 put them on notice that if they decided to accept Medicaid benefits, that money would later be recovered from their estates. MCL 400.112h(a); 400.112k. Thereafter, the decedents here first applied to receive Medicaid benefits from 2008 to 2010. (Appellant's Appendix, p 37a, ¶ 25; 112a, ¶¶ 2-3; 174a, ¶ 1; 268a.) And when they completed a later annual eligibility redetermination, they received an acknowledgment explaining that their estates would be subject to recovery. (Appellant's Appendix, p 36a ¶ 19; 112a ¶¶ 3-4; 115a ¶¶ 6-7; 175a ¶¶ 4-5; 279a ¶ 7.)

The Department's actions easily satisfy both the statute and due process. First, MCL 400.112g(3)(e) is not an independent requirement to provide "written materials" regarding the hardship process, but rather a provision requiring the state to offer hardship exemptions for federal approval. And MCL 400.112g(7) requires that "written information" be provided only at an eligibility determination, which the decedents were required to annually seek eligibility for long-term care.

Here, the acknowledgments the decedents received satisfied MCL 400.112g(7). But that statutory requirement does not transform into a constitutional mandate that the government must individually notify its citizens of how a change in the law impacts an existing right. In *Texaco, Inc v Short*, 454 US 516 (1982), the U.S. Supreme Court concluded that statutory notice satisfied the requirements of due process affecting property owners' existing mineral rights: "Generally, a legislature need do nothing more than enact and publish the law, and afford the citizenry a reasonable opportunity to familiarize itself with its terms and to comply." *Id.* at 532; see also *City of Kentwood v Estate of Sommerdyke*, 458 Mich 642, 664 (1998) (citing *Texaco* for this proposition). Thus, "persons owning property within a State are charged with knowledge of relevant statutory provisions affecting the control or disposition of such property." *Texaco*, 454 US at 532.

Significantly, the Court in *Texaco* recognized the distinction between notice of an adjudication and notice of general laws affecting property rights. The *Texaco* Court explained that "[t]he due process standards of *Mullane* apply to an '*adjudication*' that is 'to be accorded finality' " and that "*Mullane* itself distinguished the situation in which a State enacted *a general rule of law* governing the abandonment of property." *Id.* at 535 (emphasis added). Thus, the Court explained that under due process "it has never been suggested that each citizen must in some way be *given specific notice of the impact of a new statute on his property before that law may affect his property rights*." *Id.* (emphasis added); see

also *Atkins v Parker*, 472 US 115, 130 (1985) (" 'The legislative determination provides all the process that is due.' ") (citation omitted).

Moreover, MCL 400.112h(a) and MCL 400.112k are "self-executing," *Texaco*, 454 US at 537, and did not require federal approval; these statutes provided the boundaries for the program. As such, the decedents had notice via the statutes, of the fact that estate recovery would apply to all probate assets if they accepted benefits after September 30, 2007.

Indeed, once the decedents received the acknowledgments, they retained the ability to maintain their estates but apparently declined to do so. The estates' due-process argument ignores that estate recovery did not deprive the decedents of the use or possession of their property during their lives. Even post-acknowledgment, they could have exploited some Medicaid "loopholes" to avoid probate and to reap a windfall for their heirs, including by executing a ladybird deed. See Michigan Land Title Standards (6th Ed), 9.3; see also Frank, *Ladybird Deeds: Purposes and Usefulness*, 95 Mich B J 30, 32 (June 2016) ("Before or after qualifying for Medicaid benefits, the [recipient] can execute and record the ladybird deed. The deed is a transfer-on-death document; therefore, the property does not become part of the probate estate, which currently exempts the property from Medicaid recovery proceedings."). Due process does not provide a right to sit on one's available rights.

B. Estate recovery does not violate substantive due process, and it is not applied retroactively.

In the probate court proceedings below, all estates relied solely on procedural due process to invalidate estate recovery. (Appellant's Appendix, pp 18a-19a; 49a;

104a; 152a; 173a, ¶ 16.) Because the very laws that create Medicaid benefits condition their receipt on estate recovery, substantive due process does not provide an absolute right to leave an inheritance "according to that individual's desires[.]" (Est's Br, 11/4/16, at 27.)

Property rights are not defined by the Constitution but are defined by state law or the statutes creating them. *Bd of Regents of State Colleges v Roth*, 408 US 564, 577 (1972). Whether the right is unencumbered Medicaid benefits or an absolute inheritance, that right was legislatively modified by MCL 400.112g-112k mandating estate recovery and MCL 700.3101 subjecting the devolution of property at death to the rights of creditors—such as the Department, MCL 700.3805(1)(f).

Because estate recovery is mandatory, it was reasonable for the Legislature to enact estate recovery to offset the skyrocketing costs of long-term care and prevent the loss of federal funding for the Medicaid program. 42 USC 1396c. The decedents should have been aware of the uncertainties for inheritances, given the legislative enactment of estate recovery and the acknowledgments they signed.

Moreover, the Department collecting from the effective date of the state plan (July 1, 2010) does not involve retroactivity because that obligation existed since the enactment of MCL 400.112g-112k in 2007. In short, estate recovery applied prospectively to those enrolling after September 30, 2007. The estate's reliance on *Landgraf v USI Film Products*, 511 US 244, 282-283 (1994), is therefore misplaced. That case involved the Court rejecting the application of a legislative amendment to conduct that occurred *before* enactment of the amendment, but here these decedents

applied for Medicaid benefits *a year or more after* the Legislature altered the conditions attached to receiving benefits by enacting MCL 400.112g-112k. "If every time a man relied on existing law in arranging his affairs, he were made secure against any change in legal rules, the whole body of our law would be ossified forever." *Id.* (citation omitted). In sum, "entirely prospective change in the law may disturb the relied-upon expectations of individuals, but such a change [does not violate] due process." *United States v Carlton*, 512 US 26, 33–34 (1994).

II. Whether the cost of recovery is in the best interest of the state is a determination made by the Department, not the courts.

Whether the costs of recovery are in the best interest of the state of Michigan is a matter that the legislature entrusted to agency determination. The courts should not assume policy-making authority over agency determinations absent a clear legislative directive.

The estates ignore that the plain language of MCL 400.112g(4) requires the Department evaluate when state resources should be expended to pursue recovery to comply with federal law. But that does not mean the probate courts can second-guess the policy decisions of the Department, such as whether the costs of recovery are justified in a given case or even what costs are appropriate to consider.

Moreover, the estates' reliance on 42 USC 1396p(b)(3) is misplaced because that provision requires states to develop a hardship definition acceptable to the federal government. Likewise, MCL 400.112g(3)(g) provides that the Department must seek approval and implement the *hardship* definition to not unreasonably harm the heirs. Neither provision is about evaluating the costs the recovery.

Furthermore, § 3810(E) of the federal Medicaid Manual instructs states on the development of their state plans. That provision provides that "[y]ou may waive adjustment or recovery in cases in which it is not cost effective for you to recover from an individual's estate. The individual does not need to assert undue hardship. *You may determine* that an undue hardship exists when it would not be cost effective to recover the assistance paid." (Emphasis added). No provision allows the probate courts to second-guess the policy decisions of the Department through litigation, nor does the statute set out any judicially manageable standards by which to test the Department's decisions. The estates would transform MCL 400.112g(4) to bar recovery when it would be in the best economic interests of the estate's heirs—apparently in all cases of recovery—by deleting the phrase "is not in the best economic interest of the *state*." (Emphasis added).

CONCLUSION AND RELIEF REQUESTED

Medicaid is a cooperative federal program designed to assist the poor; any money recovered from a beneficiary's estate aids that purpose. The Due Process Clause does not provide a right to evade the enactment of MCL 400.112g through MCL 400.112k, which are designed to preserve the limited pool of Medicaid funds for the needy. Because the decedents received both statutory and individualized notice, no due-process violation occurred. Further, whether costs of recovery are in the best economic interests of the state is left to the Department's determination and not subject to judicial second-guessing. The Department respectfully requests that this Court reverse the Court of Appeals for the reasons stated in the dissent.

Respectfully submitted,

Bill Schuette
Attorney General

Aaron D. Lindstrom (P72916)
Solicitor General
Counsel of Record

Matthew Schneider (P62190)
Chief Legal Counsel

/s/ Brian K. McLaughlin
Brian K. McLaughlin (P74958)
Geraldine A. Brown (P67601)
Assistant Attorneys General
Attorneys for Michigan Department
of Health and Human Services
Plaintiff/Appellant
Health, Education & Family
Services Division
P.O. Box 30758
Lansing, MI 48909
(517) 373-7700

Dated: November 28, 2016